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ABSTRACT

This document is one in a series that addresses issues of employment and dismissal matters in the North Carolina Department of Public Instruction. This issue focuses on employment at will, which exists at the will of each party. At-will employees are employed for an indefinite term; either side may end the employment without the others' consent. At-will employees include all other local school employees who are in neither a certified nor contract position. In North Carolina, employees at will have a number of statutory protections that relate to termination. The interpretive analysis section points out that North Carolina courts have long held that at-will employment may be terminated for no reason or for an arbitrary or irrational reason. However, they have also refused to allow the discharge of at-will employees for unlawful reasons or reasons that violate public policy. A question-and-answer section highlights frequent areas of concern. The appendix outlines North Carolina law relating to employees at will, specifically: unlawful discharge of juror, prohibition of discrimination, hiring of school personnel, entitlement, employee rights, penalties for denial, and prohibition of employee discrimination. (LMI)

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A Series of Discussions on Legal Issues in Elementary and Secondary Education

SCHOOL MANAGEMENT ADVISOR

By Harry E. Wilson, Agency Legal Specialist

NORTH CAROLINA DEPARTMENT OF PUBLIC INSTRUCTION EDUCATION BUILDING, RALEIGH, NC 27601-2825 919/715-1000

Issue 23: 1993 BOB ETHERIDGE, SUPERINTENDENT OF PUBLIC INSTRUCTION

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LEGAL REQUIREMENTS

Employees at will have a number of statutory protections that relate to termination. G.S. 9-32 prohibits discharging an employee for reporting for jury duty. G.S. 95-241 protects employees from retaliatory action who participate in listed claims such as Workers' Compensation and OSHA. G.S. 127A-201 through 203 prohibit discharge for serving in the North Carolina National Guard. G.S. 127B-14 provides similar protection to employees who are called to emergency military service. G.S. 115C-315 addresses the hiring of at-will employees but does not include termination. These statutes are reproduced in the Appendix.

INTERPRETIVE ANALYSIS

Generally, employees in North Carolina may be dismissed for any reason or for no reason unless:

- the employee has specific contract protections.
- the employee has statutory employment rights, such as employment under the State Personnel Act of the Fair Employment and Dismissal Act ["Teacher Tenure Act"].
- the employer has discriminated against the employee on the basis of race, sex, color, national origin, religion, age, or handicap.
- the employee has been dismissed for proper exercise of free speech rights.
- the employee has been dismissed for exercise of other activities that are protected by law, such as military service, jury service, or filing Wage and Hour Act claims.

At-will employees are employed for an indefinite term; their employment exists at the will of each party. In other words, either side may end the employment without the other's consent. Our courts have said that the offer of "permanent employment" or "a job for life" is employment at will because the employment is not for a definite length of time. Clearly school employees such as central office administrators, school-based administrators and career status teachers are *not* at-will employees. Each group has contracts for definite periods and teachers have other statutory protections relating to career status. However, many other school employees are at-will employees, including office and clerical staff, teacher assistants, cafeteria workers, maintenance workers and transportation workers. Probationary teachers are in a unique situation that is partially at-will and partially protected; Issue 24 addresses that situation.

School boards may confer more rights on at-will employees than are legally necessary through policies or contracts. Board policies might require specific reasons for dismissal or establish hearing rights and procedures. In addition, the board might hire noncertified employees pursuant to a contract that either states a specific length of employment or incorporates a personnel manual with provisions regarding dismissal grounds and procedures. Since at-will employees have no statutory rights in these areas, school boards and their attorneys might want to examine their policies to see if any changes might be warranted.

Our courts have long said that at-will employment may be terminated for no reason or for an arbitrary or irrational reason. But our courts have also refused to allow the discharge of at-will employees for unlawful reasons or reasons that violate public policy. The law in this area is unclear because courts have only recently begun

EA025 998

to recognize exceptions to the at-will rule. Unlawful reasons involve the employee's exercise of legally-protected rights, such as the right to file a workers' compensation claim or the right of freedom of speech. Public policy is the legal principle that no one can lawfully do something that tends to injure the public or that is against the public good. These reasons are more difficult to define, because courts normally determine matters of public policy. Examples of public policy violations that the courts have recognized include the employer asking an employee to commit perjury, to falsify truck logs required by federal and state transporation agencies, and to work for less than the minimum wage.

Persons who challenge their dismissal from at-will positions usually claim that they have been wrongfully discharged from their jobs. That is, despite their at-will status, they engaged in protected conduct and were fired as a result of that conduct. Those who have successfully challenged their dismissal have been awarded damages for lost future wages, back pay, or reinstatement to their prior job.

Q: Is the board or its agent required to give an at-will employee a reason for dismissal?

A: No.

Q: Should the board have a record of the reason that it dismissed an at-will employee?

A: Yes, it is probably best to keep these records. If the former employee challenges the dismissal as being for an improper reason, the board can then show the court that its reason was proper. Of course if the reason was improper, then the board will have to take the employee back and possibly pay damages in addition to back pay.

Since the board does not need a reason to dismiss an at-will employee, it could simply follow the recommendations of staff without regard to the reasons behind those recommendations. But if the former employee challenges the dismissal in court, the lack of records may hinder the board's defense. Maintaining records may also alert the board to a discriminatory practice if those records show that a protected class of employees is being dismissed in greater proportion than the pool of employees as a whole.

Q: Do employees at will normally have signed contracts with the employer?

A: No, and that is a reason why there is no definite period of employment. If a written contract assures continued employment as long as the employee provides satisfactory services but contains no length of employment, the employment is still at will.

Q: How are the courts likely to react to a dismissal where the supervisor just did not like the employee and gave poor evaluations that led to dismissal?

A: Our courts have not recognized "bad faith" as an improper reason for terminating an at-will employee. Some recent cases have sent mixed signals on this issue, however.

Q: How can school officials understand what public policy is if the courts are having difficulty defining the term?

A: Public policy prohibits that which tends to injure the public or is against the public good. What is or is not public policy has never been totally definable, but there are some pointers to help the layman examine specific questions. First, did the employer direct the employee to do something that the law prohibits? If so, dismissing an employee who refuses to follow that direction is against public policy.

Second, is the injury caused by dismissal limited to the plaintiff or is it likely to extend to the public at large? In other words, might it provide a precedent that may be applied to a much larger group? If so, there is likely a public policy violation.

Q: Are there specific school-related situations that may violate public policy?

A: Yes. For example, an employee who is fired for reporting that false attendance records have been sent to the State would most likely succeed in a wrongful discharge suit. The same should be true for a school bus driver who is fired for refusing to operate a defective bus that poses a significant threat to the safety of school children. Similarly, an employee

who is fired for reporting suspected child abuse to DSS after a supervisor decided not to make the report should also win reinstatement.

APPENDIX
State Law Relating to Employees at Will

§ 9-32. Discharge of juror unlawful.

(a) No employer may discharge or demote any employee because the employee has been called for jury duty, or is serving as a grand juror or petit juror.

(b) Any employer who violates any provision of this section shall be liable in a civil action for reasonable damages suffered by an employee as a result of the violation, and an employee discharged or demoted in violation of this section shall be entitled to be reinstated to his former position. The burden of proof shall be upon the employee.

(c) The statute of limitations for actions under this section shall be one year pursuant to G.S. 1-54.

§ 95-241. Discrimination prohibited.

(a) No person shall discriminate or take retaliatory action against an employee because the employee in good faith does or threatens to do any of the following:

(1) File a claim or complaint, initiate any inquiry, investigation, inspection, proceeding, or other action, or testify or provide information to any person with respect to any of the following:
   a. Chapter 97 of the General Statutes. [Workers' Compensation Act]
   b. Article 2A or Article 16 of this Chapter. [Wage and Hour Act; OSHA]
   c. Article 2A of Chapter 74 of the General Statutes. [Mine Safety and Health Act]

(2) Cause any of the activities listed in subdivision (1) of this subsection to be initiated on an employee's behalf.

(3) Exercise any right on behalf of the employee or any other employee afforded by Article 2A or Article 16 of this Chapter or by Article 2A of Chapter 74 of the General Statutes.

(b) It shall not be a violation of this Article for a person to discharge or take any other unfavorable action with respect to an employee who has engaged in protected activity as set forth under this Article if the person proves by the greater weight of the evidence that it would have taken the same unfavorable action in the absence of the protected activity of the employee.

§ 115C-315. Hiring of school personnel.

(a) Janitors and Maids. — In the city administrative units, janitors and maids shall be appointed by the board of education of such local school administrative unit upon the recommendation of the superintendent.

(b) Election by Local Boards. — School personnel shall be elected by the local board of education upon the recommendation of the superintendent, in accordance with the provisions of G.S. 115C-276(j).

It is the policy of the State of North Carolina to encourage and provide for the most efficient and cost-effective method of meeting the needs of local school administrative units for noncertified support personnel. To this end, the State Board of Education shall recommend to the General Assembly by November 1, 1984, a system using factors and formulas to determine the total number of noncertified support personnel allotted to local school administrative units. The recommended system for allotting noncertified support personnel shall include the proposed State's funding obligation for these positions and shall be developed in consultation with school-based support personnel or their representatives.

(c) Prerequisites for Employment. — All professional personnel employed in the public schools of the State or in the schools receiving public funds shall be required either to hold or be qualified to hold a certificate in compliance with the provision of the law or in accordance with the regulations of the State Board of Education: Provided, that nothing herein shall prevent the employment of temporary personnel under such rules as the State Board of Education may prescribe.

(d)Certification for Professional Positions. — The State Board of Education shall have entire control of certifying all applicants for professional positions in all public elementary and high schools of North Carolina; and it shall prescribe the rules and regulations for the renewal and extension of all certificates and shall determine and fix the salary for each grade and type of certificate which it authorizes: Provided, that the State Board of Education shall require each applicant for an initial certificate or graduate certificate to demonstrate his academic and professional preparation by achieving a prescribed minimum score at least equivalent to that required by the Board on November 30, 1972, on a standard examination appropriate and adequate for that purpose: Provided, further, that in the event the Board shall specify the National Teachers Examination for this purpose, the required minimum score shall not be lower than that which the Board required on November 30, 1972.

(e) Repealed by Session Laws 1989, c. 385, s. 3, effective June 21, 1989.

(f) Employing Persons Not Holding Nor Qualified to Hold Certificate. — It shall be unlawful for any board of education to employ or keep in service any professional person who neither holds nor is qualified to hold a certificate in compliance with the provisions of the law or in accordance with the regulations of the State Board of Education.

§ 127A-201. Entitlement.

Any member of the North Carolina National Guard who, at the direction of the Governor, enters State duty, is entitled, upon honorable release from State duty, to all the reemployment rights provided for in this Article.

§ 127A-202. Rights.

Upon release from State duty, the employee shall make written application to his previous employer for reemployment within five days of his release from duty or from hospitalization continuing after release. If the employee is still qualified for his previous employment, he shall be restored to his previous position or to a position of like seniority, status and salary, unless the employer's circumstances now make the restoration unreasonable. If the employee is no longer qualified for his previous employment, he shall be placed in another position, for which he is qualified, and which will give him appropriate seniority, status and salary, unless the employer's circumstances now make the restoration unreasonable.

§ 127A-203. Penalties for denial.

If any employer, public or private, fails or refuses to comply with G.S. 127A-202, the superior court for the district of the employer's place of business may, upon the filing of a motion, petition, or other appropriate pleading by the employee, require the employer to comply with G.S. 127A-202 and to compensate the employee for any loss of wages or benefits suffered by reason of the employer's unlawful failure or refusal.

§ 127B-14. Employer discrimination prohibited.

No employer or officer or agent of any corporation, company, or firm, or other person shall discharge any person from employment because of the performance of any emergency military duty by reason of being an officer, warrant officer or enlisted person of the military or naval forces of this State or the United States.

FOR FURTHER READING:

Johnson, "Discharge of Nonprofessional Employees," School Law Bulletin, July, 1979.

School Management Advisor, Issue 22, Employment Basics.

School Management Advisor, Issue 24, Reduction in Force.

School Management Advisor, Issue 25, Nonrenewal of Probationary Teachers.

School Management Advisor, Issue 26, Dismissal of Career Status Employees.

School Management Advisor, Issue 27, Negligent Hiring and Retention.

School Management Advisor, Issue 28, Certificate Suspension and Revocation.